BIMB Musyarakah Satu Sdn Bhd v Lee Kik Hooi & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D11(D6)–22–238 OF 2003
NALLINI PATHMANATHAN JC
23 APRIL 2009

Companies and Corporations — Winding up — Disposition of property — Prohibition of improper alienation and dissipation of company's property after presentation of winding up petition — Companies Act 1965 s 223 — Whether exercise of put option agreement amounted to contravention of s 223 — Sale of shares in company under winding up proceedings — Shares belonging to third party — Whether company's property — Whether contravention of s 223

Vide a 'subscription cum shareholders' agreement ('subscription agreement'), the plaintiff ('BIMB') agreed to subscribe to 612,500 ordinary shares in Integrated Food Systems & Services Asia Pacific Sdn Bhd ('the company') of which the defendants were the existing shareholders. In consideration of this, the defendants granted a put option to BIMB vide a put option agreement, under which the defendants granted BIMB the right to require the defendant to purchase the 612,500 option shares from it upon exercise of the option by BIMB. Under the terms of the put option agreement, BIMB could call on the put option in the event of the occurrence of an event of default, which was defined in the subscription agreement. Less than a year later, a receiver and manager was appointed to oversee the affairs of the company. This amounted to an event of default under subscription agreement and thereby under the put option agreement entitled BIMB to exercise its rights under the put option agreement. This suit concerned the enforceability of this put option agreement in the light of winding up proceedings commenced against the company prior to the call on the put option. It was contended for the defendants that the put option agreement could not be enforced as it would amount to a contravention of s 223 of the Companies Act 1965 ('the Act'). BIMB sought an order of specific performance of the option against the defendants. The issues that fell to be considered were: (i) whether BIMB could enforce the put option agreement against the defendants when the company had been wound up and the date of commencement of winding up preceded the date of exercise of the put option agreement; (ii) whether the exercise of the put option agreement amounted to a contravention of s 223 of the Act; and (iii) whether as of the date of the put option agreement BIMB had effectively subscribed to the shares and whether the shares did belong to it. The defendants claimed that the put option agreement was not valid as the

shares did not belong to BIMB yet. The defendants also claimed that the winding up of the company was contributed to by BIMB through its representative and there was 'mala fide' on the part of BIMB.

Held, allowing the plaintiff's claim with costs:

(1) Section 223 of the Act serves to prohibit the improper alienation and dissipation of the property of, or belonging to a company made between the time when a winding up petition is presented and the order for winding up is made, unless the court otherwise orders. In the instant case it was not the company's property that was the subject matter of the purchase and thereby disposition, but the property of BIMB. The property of BIMB comprised 612,500 shares in the company. BIMB was seeking to enforce its right to sell to the defendants, BIMB's shares. Therefore, s 223 of the Act did not come into play (see para 17).

(2) The clear factual evidence showed not only that payment was made for the shares in the sum of RM612,500 but that the option shares were duly allotted to BIMB and the share certificate No 035 evidenced BIMB's ownership of the option shares. The second defendant in his cross-examination agreed that BIMB was the owner of the 612,500 shares in the company (see para 25).

(3) In cross-examination, the second defendant conceded that it was not the duty of BIMB to 'save' the company. He also agreed that attempts had been made by BIMB to assist the company to sell the shares to a third party. The evidence was far from satisfactory to demonstrate any element of mala fides on the part of BIMB (see para 27).

(4) There was no reason why BIMB should not enforce the put option agreement which was entered into by it with the shareholders of the company as an integral part of its investment in the company (see para 28).

[Bahasa Malaysia summary

Melalui perjanjian 'persetujuan pembelian dan pemegang saham' ('perjanjian persetujuan pembelian'), plaintif ('BIMB') telah bersetuju untuk membeli 612,500 saham biasa Integrated Food Systems & Services Asia Pacific Sdn Bhd ('syarikat tersebut') yang mana defendan-defendan merupakan pemegang-pemegang saham sedia ada. Sebagai balasan untuk ini, defendan-defendan telah memberikan opsyen put kepada BIMB melalui perjanjian opsyen put, di mana defendan-defendan telah memberikan BIMB hak untuk menghendaki defendan membeli 612,500 saham-saham pilihan daripadanya setelah melaksanakan pilihan oleh BIMB. Di bawah

terma-terma perjanjian opsyen put, BIMB boleh memanggil untuk pilihan letakan itu sekiranya berlaku kegagalan, yang ditaksirkan dalam perjanjian persetujuan pembelian. Kurang daripada setahun kemudian, penerima dan pengurus telah dilantik untuk menyelia urusan-urusan syarikat. Ini membawa kepada pelanggaran di bawah perjanjian persetujuan pembelian dan oleh itu di bawah perjanjian opsyen put memberikan hak kepada BIMB untuk menggunakan hak-haknya di bawah perjanjian pilihan letakan itu. Guaman ini adalah berkaitan penguatkuasaan perjanjian opsyen put ini berdasarkan prosiding penggulungan yang dimulakan terhadap syarikat tersebut sebelum memanggil untuk opsyen put tersebut. Adalah dihujahkan bagi pihak defendan-defendan bahawa perjanjian opsyen put tidak boleh dikuatkuasakan kerana ia membentuk pelanggaran s 223 Akta Syarikat 1965 ('Akta'). BIMB telah memohon perintah pelaksanaan spesifik untuk pilihan tersebut terhadap defendan-defendan. Isu-isu yang perlu dipertimbangkan adalah: (i) sama ada BIMB boleh menguatkuasakan perjanjian opsyen put terhadap defendan-defendan apabila syarikat tersebut digulungkan dan tarikh bermulanya penggulungan sepatutnya sebelum tarikh pelaksanaan perjanjian pilihan letakan; (ii) sama ada pelaksanaan perjanjian opsyen put merupakan pelanggaran s 223 Akta; dan (iii) sama ada sehubungan dengan tarikh perjanjian opsyen put itu BIMB telah bersetuju untuk membeli saham-saham tersebut dan sama ada saham-saham tersebut sememangnya miliknya. Defendan-defendan mendakwa bahawa perjanjian opsyen put tidak sah kerana saham-saham tersebut masih belum menjadi milik BIMB lagi. Defendan-defendan juga mendakwa bahawa penggulungan syarikat telah disebabkan oleh BIMB melalui representasinya dan terdapat *mala fide* di pihak BIMB.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Seksyen 223 Akta melarang pemerolehan dan pelupusan harta atau milikan syarikat yang ditubuhkan antara waktu apabila petisyen penggulungan dikemukakan dan perintah untuk penggulungan dibuat, kecuali jika mahkamah memerintahkan sebaliknya. Dalam kes ini harta syarikat tersebut bukan merupakan perkara pokok pembelian dan oleh itu boleh dilupuskan, tetapi harta BIMB. Harta BIMB merangkumi 612,500 saham-saham dalam syarikat tersebut. BIMB telah memohon untuk menguatkuasakan haknya untuk menjual kepada defendan-defendan, saham-saham BIMB. Oleh itu, s 223 Akta tidak terpakai (lihat perenggan 17).

(2) Keterangan fakta jelas menunjukkan bukan sahaja pembayaran telah dibuat untuk saham-saham sejumlah RM612,500 tetapi bahawa pilihan saham telahpun diagihkan kepada BIMB dan sijil saham No 035 menjadi bukti pemilikan BIMB ke atas saham-saham pilihan

tersebut. Defendan kedua dalam pemeriksaan balasnya bersetuju bahawa BIMB adalah pemilik 612,500 saham-saham dalam syarikat tersebut (lihat perenggan 25).

(3) Dalam pemeriksaan balas, defendan kedua mengakui bahawa ia bukan kewajipan BIMB untuk 'menyelamatkan' syarikat tersebut. Dia juga bersetuju bahawa percubaan-percubaan telah dibuat oleh BIMB untuk membantu syarikat tersebut menjual saham-saham kepada pihak ketiga. Tiada keterangan yang meyakinkan untuk menunjukkan apa-apa elemen mala fide di pihak BIMB (lihat perenggan 27).

(4) Tiada alasan kenapa BIMB tidak patut menguatkuasakan perjanjian opsyen put yang ditandatanganinya dengan pemegang-pemegang saham syarikat tersebut sebagai bahagian penting pelaburan syarikat tersebut (lihat perenggan 28).]

Notes

For cases on disposition of property, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1035–1047.

Cases referred to

Fench's Wine Bar Ltd, Re [1987] BCLC 499 (refd)
Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309, HC (refd)
Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors [1996] 2 MLJ 666, CA (refd)
Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy [2003] 2 MLJ 523, HC (refd)

Legislation referred to

Companies Act 1948 [UK] s 227
Companies Act 1965 s 223
Insolvency Act 1986 [UK] s 522

Marzuki Hashim (Tarmizi Marzuki & Sulaiman) for the plaintiff.
Periasamy (Peri & Associates) for the second defendant.

Nallini Pathmanathan JC:

INTRODUCTION

[1] The primary issue that arises for consideration in this suit is whether the plaintiff ('BIMB Musyarakah') is entitled to enforce a put option agreement dated 17 October 2001 ('the put option agreement') against the defendants, the existing shareholders of one Integrated Food Systems & Services Asia Pacific Sdn Bhd ('the company') in respect of 612,500 ordinary shares of the company ('the option shares') as of 21 November 2002, given that winding

A up proceedings were commenced against the company on 18 July 2002 and that the company was wound up on 12 December 2002. In essence it is contended for the defendant shareholders that the put option agreement cannot be enforced as it would amount to a contravention of s 223 of the Companies Act 1965. Section 223 of the Companies Act 1965 provides as
B follows:

> shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

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[2] BIMB Musyarakah seeks an order of specific performance against the second, third and fifth defendants to purchase and pay to it that portion of the sum of RM696,320.21 as they are respectively liable for, where
D RM696,320.21 is the total option price for the re-purchase of all 612,500 ordinary shares held by BIMB Musyarakah in the company. BIMB Musyarakah also seeks the sanction of this court to effect the transfer of the subject shares to the respective defendants. Alternatively it seeks damages for breach of contract by the defendants.

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THE DEFENDANTS AT TRIAL

[3] At the trial of this action, only the second defendant Choong Kooi Kong appeared to defend the claim. The plaintiff advised the court that it is
F not proceeding against the first and fourth defendants. The third and fifth defendants did not appear in court at trial and their solicitors Messrs Tunku Farik & Wong had discharged themselves prior to the date of trial. It is relevant to note that the total number of shares held by the five shareholders was 2,310,000 shares and that the second defendant held 4.90% or 120,000
G shares in the company, the third defendant, 24.5% or 600,000 shares in the company and the fifth defendant, 12.24% or 300,00 shares in the company.

SALIENT FACTS OF THE CASE

H **[4]** Vide a 'subscription cum shareholders' agreement' ('subscription agreement') dated 17 October 2001, BIMB Musyarakah agreed, by way of investment, to subscribe to 612,500 ordinary shares in the company at a price of RM612,500, on the terms set out in the subscription agreement. As stated by Nor Idzam bin Ya'akub, PW1, BIMB Musyarakah's first witness ('PW1'),
I who had previously held the position of director, BIMB Musyarakah is a venture capital company that invests in specific companies in anticipation of such companies being listed on Bursa Malaysia, (see exh P7 at p 49 of the agreed bundle of documents). In addition to these 612,500 shares in the company, BIMB Musyarakah also invested in the 'marketing' arm of the

company by subscribing to 30,000 shares at a cost of RM30,000 and by offering a Murabahah Convertible Redeemable Instrument ('MCRI') to the company at a total value of RM2,357,500 on terms set out in another agreement ('MCRI agreement'). A

[5] In consideration of BIMB Musyarakah having invested by subscribing to the shares as set out above, the existing shareholders, namely the defendants, agreed to grant a put option to BIMB Musyarakah vide a put option agreement. It is this put option agreement dated 17 October 2001 that comprises the subject matter of this action, namely its enforceability, in the light of winding up proceedings having been commenced against the company, prior to the call on the put option having been made against the defendant shareholders. B C

[6] Vide the put option agreement also dated 17 October 2001 (see exh P2 at pp 35–46 of the agreed bundle of documents), the existing shareholders, ie the defendants granted to BIMB Musyarakah the right to require the existing shareholders to purchase the 612,500 option shares from it upon exercise of the option by BIMB Musyarakah. Upon such exercise the shareholders became bound to purchase those option shares. Under the terms of the put option agreement, BIMB Musyarakah could call on the put option in the event of the occurrence of an event of default, which is defined in the subscription cum shareholders agreement of the same date. D E

[7] Clause 9 of the subscription cum shareholders' agreement provides that upon the occurrence of any one of the sixteen events of default as enumerated there, BIMB Musyarakah has the option to sell its block of option shares to the shareholders at the cost paid by it plus 15% holding costs per annum for the duration of the investment. One of the events of default expressly stipulated is that where a receiver or manager is appointed in respect of the company's undertaking or property or any part of it by any bank, financial institution or any other person, (see exh P1 at pp 22–23 of the agreed bundle of documents). F G

[8] Both PW1 and Rashidin bin Jamani the Director of Corporate Affairs and Investment in BIMB Musyarakah, PW2 ('PW2') testified that as of 2 November 2001, BIMB Musyarakah had fully paid for the subscription of the 612,500 ordinary shares in the company as termed in the subscription agreement (see exh P3 at p 47 of the agreed bundle of documents comprising a letter presenting, inter alia, a cheque in the sum of RM612,500). H I

[9] On 17 September 2002, less than a year later, a receiver and manager was appointed to oversee the affairs of the company. This amounted to an event of default under subscription and shareholders' agreement and thereby

under the put option agreement entitling BIMB Musyarakah to exercise its rights under the put option agreement. Clause 3 of the put option agreement provides that upon the occurrence of an event of default the put option may be exercised by serving written notice to the shareholders. SP2 gave evidence that written notices were issued to the shareholders on 21 November 2002.

[10] Although the actual notice issued to the second defendant was not exhibited by BIMB Musyarakah, they did exhibit other notices sent to the third and fifth defendants. They did however exhibit the notification of posting of these notices by registered post to all the defendants, including the second defendant in exh P9 (at p 58 of the agreed bundle of documents). The second defendant's solicitors confirmed that they were not disputing that the notice was in fact sent to the second defendant.

[11] Vide these notices, BIMB Musyarakah officially notified the shareholders of the company that an event of default had occurred as of 17 September 2002 and that as such it was giving the shareholders notice to purchase the 612,500 ordinary shares in the company at the option price of RM696,320.21. The shareholders were given a period of one month to comply by purchasing the option shares.

[12] Prior to these events however, on 18 July 2002 a winding up petition had been presented against the company by one Ultimate Circle Sdn Bhd. An order was granted winding up the company subsequently on 12 December 2002 (see exh P5 at p 59 of the agreed bundle of documents).

[13] It is in the context of this factual matrix that the second defendant contends that as the effective date of winding up was 18 July 2002, the exercise of the put option agreement occurred after winding up commenced and therefore is void by reason of s 223 of the Companies Act 1965.

ISSUES

[14] The issues that fall to be considered are as follows:

(i) Can BIMB Musyarakah enforce the put option agreement against the defendant shareholders when the company has been wound up and the date of commencement of winding up, ie 18 July 2002 precedes the date of exercise of the put option agreement, ie 21 November 2002?

(ii) Would the exercise of the put option agreement amount to a contravention of s 223 of the Companies Act 1965?

(iii) As of the date of the put option agreement on 17 October 2001 BIMB Musyarakah had not effectively subscribed to the shares and therefore

the shares did not belong to it. As such the put option agreement is not valid as it would be impossible for the second defendant to buy the shares from BIMB Musyarakah when the shares do not belong to it.

(iv) The winding up of the company was contributed to by BIMB Musyarakah through its representative and there was 'mala fide' on the part of the plaintiff. These issues will be considered in turn.

Issue (i) and (ii): Whether or not the put option agreement can be enforced given that the company was wound up? Would the exercise of the put option agreement amount to a contravention of s 223 of the Companies Act 1965?

[15] These two issues fall to be considered together. The second defendant's contention is that in view of the provisions of s 223, the purported disposition of the shares of the company vide the put option agreement is void as winding up proceedings had already commenced against the company and accordingly, no disposition of the shares of the company could be effected without the sanction of the court. In support of this contention, learned counsel for the second defendant, Mr Periasamy relies on *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 where the Supreme Court had occasion to consider whether the transfer of three portions of land of a company in liquidation to a licensed finance company controlled by one Amos William Dawe was void, inter alia, by reason of s 223 of the Companies Act 1965. In that case, the three dispositions of land were registered after the presentation of a winding up petition by the court and were therefore void under s 223. The issue before the Supreme Court was whether the learned judge in the High Court had exercised his jurisdiction correctly in validating the said transfers. In considering this issue, Seah SCJ had occasion to consider the purpose and effect of s 223 of the Companies Act 1965 by considering the corresponding section in the English Companies Act 1948, namely s 227. This is what His Lordship said:

> *Wiltshire Iron Company* (1868) 3 Ch App 443, Lord Cairns LJ speaking of the general purpose of s 153 (the forerunner of section 227) of the English Companies Act 1862, said at p 446:
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> > The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of winding up (that is the presentation of the petition) and the order for winding up shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is in the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding up petition, which may fail or may succeed, if it were to be supposed

A that transactions in the ordinary course of its current trade, bona fide entered into and completed would be avoided, and would not in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, ipso facto, paralyse the trade of the company and great injury, without any counterbalance of advantage, would be done to those interested in the assets of the company.

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[16] This then summarises the true purport and intention of the section. Further on in the judgment in relation to validation, Seah SCJ went on to cite another English authority:

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Dealing with the phrase 'unless the court otherwise orders' in s 227 of the Companies Act 1948 in *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21, Vaisey J said: 'The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion.'

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[17] It is evident from the foregoing passages that s 223 serves to prohibit the improper alienation and dissipation of the property of, or belonging to a company made between the time when a winding up petition is presented and the order for winding up is made, unless the court otherwise orders. This begs the question, what is the property of the company in the instant case that is sought to be transferred? In the instant case, it is BIMB Musyarakah that seeks to enforce a put option agreement, ie BIMB Musyarakah seeks to force the defendant shareholders to purchase its shares in the company. In other words, BIMB Musyarakah seeks to make, inter alia, the second defendant purchase the shares it owns in the company at the option price. It therefore becomes apparent that it is not the company's property that is the subject matter of the purchase and thereby disposition, but the property of BIMB Musyarakah. The property of BIMB Musyarakah comprises 612,500 shares in the company. In short BIMB Musyarakah is seeking to enforce its right to sell to the shareholders of the company its shares, at a price which was agreed upon in the put option agreement. If it is not the property of the company, but the property of BIMB Musyarakah that is sought to be sold, then it would appear that s 223 of the Companies Act 1965 does not come into play.

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[18] It is also relevant to keep in mind that the put option agreement was entered into bona fide, in the course of BIMB Musyarakah investing its monies in the company. The put option agreement served as a security for BIMB Musyarakah to recoup part of its investment in the company.

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[19] Another case cited in support of the second defendant's contention is

Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309 where monies were paid by the company in liquidation to one supporting creditor and a piece of land transferred to another creditor were held to be dispositions of the property of the company after a winding up petition had been presented and were therefore contrary to s 223 of the Companies Act 1965 and held to be void. Again the case is in stark distinction to the instant case where there has been no disposition of any property belonging to the company. The property sought to be sold belongs to BIMB Musyarakah and enforcement is sought against the shareholders of the company, rather than the company itself. This case does not support the second defendant's contention.

[20] Finally the case of *Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors* [1996] 2 MLJ 666 is cited by the second defendant. However this case, like the cases above confirms the position that where commencement of winding up has occurred the disposition of the company's property will be void unless otherwise ordered by court. Here too the issue related to payments sought to be made by the company in liquidation in the course of its day to day business. In the course of his judgment His Lordship Kang Hwee Gee J considered whether the payments in that case fell within the definition of 'dispositions of property' within the ambit of s 223. The learned judge relied on the decision of Vinelott J in *Re Fench's Wine Bar Ltd* [1987] BCLC 499 where he held that where a company has entered into an unconditional contract for the sale of its property which was specifically enforceable before the presentation of a winding up petition, then the completion fo the contract according to its term would not constitute a disposition within the meaning of s 522 of the Insolvency Act 1986 (formerly s 227 of the Companies Act 1948). The words disposition of property in his view meant the disposition of free assets to which the company is beneficially entitled and which are capable of being realised for the benefit of its creditors.

[21] Again it becomes apparent that the option shares comprising the subject matter of the put option agreement between BIMB Musyarakah and the defendant shareholders are not 'free assets to which the company is beneficially entitled and which are capable of being realised for the benefit of its creditors'. Again it is demonstrated that s 223 is simply not applicable to the transaction in the instant case.

[22] An instructive case on point is *Nadaraja a/l Muthu & Ors v Palanisamy a/l Ramasamy* [2003] 2 MLJ 523 where the plaintiff obtained judgment against the defendant in the sum of RM4m and took out an application for charging orders in respect of shares held by the defendant in one Biografik (M) Sdn Bhd. A charging order was granted despite opposition from the defendant. When the plaintiff applied to execute the judgments, the

defendant opposed the application on the grounds that the plaintiff's application would amount to a violation of s 223. In allowing the plaintiff's application, Vincent Ng J (as His Lordship then was) held as follows (at p 527):

> Despite the defendant's attempt to blur the distinction between the company and its shareholders, it is trite law that the shareholder of a company is a distinct and separate legal entity from the company in which he holds shares (see *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estates Sdn Bhd* [1985] 2 MLJ 165 at p 167). The plaintiff's application is for recovery of two money judgments against a defendant by means of charges against his personal property, which although is in the form of company shares, has nothing to do with the company itself. In other words, the plaintiffs are the creditors of the shareholder, not the company. It is also trite law that s 223 of the Act applies to creditors of the company and its true purpose is to protect the property of the company for equal distribution amongst the unsecured creditors of the company in question. The true intention of the section is to safeguard the company's property and not that of its individual shareholders. In my considered view, the sole test to determine whether execution of the charging order in the instant case is caught within s 223, is to ask whether such execution would affect the property of the company through effecting improper alienation or dissipation of its property. Thus I would hold that the words, 'disposition of the property of the company' ought logically to be read conjunctively with the phrase and any transfer of shares or alteration in the status of the members of the company in s 223. It would follow that transfer of shares which do not entail or involve disposition or dissipation of the company's property do not come within the purview of s 223 ...

[23] Applying the foregoing to the instant case, it becomes immediately clear that the transfer of shares here does not entail or involve the disposition or dissipation of the company's property. As such s 223 is simply not applicable. The shares in the instant case belong to BIMB be shares belonging to the company, and not the option shares.

Issue (iii): As of the date of the put option agreement on 17 October 2001 BIMB Musvarakah had not effectively subscribed to the shares and therefore the shares did not belong to it. As such the put option agreement is not valid as it would be impossible for the second defendant to buy the shares from BIMB Musvarakah when the shares do not belong to it

[24] The second defendant essentially contends here that as the sum of RM612,500 was not paid by BIMB Musyarakah on 17 October 2001, the put option shares do not belong to it and therefore the put option agreement is not valid, as logically, BIMB Musyarakah cannot sell shares when it does not own them.

[25] This contention ignores the clear factual evidence of PW1, PW2 as well as the documentary evidence in exhs P3 (at p 47 of the agreed bundle) and exhs P6 and P7 (at pp 48–49 of the agreed bundle) which show not only that payment was made for the shares in the sum of RM612,500 but that the option shares were duly allotted to BIMB Musyarakah as of 8 November 2003 and the share certificate No 035 evidences BIMB Musyarakah's ownership of the option shares. And when the second defendant was cross-examined, he agreed that BIMB Musyarakah is the owner of the 612,500 shares in the company.

[26] In any event the put option agreement does not envisage that the RM612,500 be fully paid on the date of the Agreement. It is evident from a reading of the entirety of the agreement that it envisages that BIMB Musyarakah 'shall' invest by subscribing to the said shares. The ancillary contention to this issue was that as the payment for the subscription to the 612,500 shares was made on 2 November 2001, some sixteen days rather than fourteen days after the execution of the Subscription cum Shareholder's Agreement and the put option agreement, there was a delay which in some way invalidated the put option agreement. There was no objection to the two day delay and parties proceeded to issue the shares to BIMB Musyarakah, as well as accept and utilise the monies invested by BIMB Musyarakah. The delay was therefore waived. It did not have the effect of invalidating the put option agreement in any manner. Accordingly this contention is entirely without merit.

Issue (iv): The winding up of the company was contributed to by BIMB Musyarakah through its representative and there was 'mala fide' on the part of BIMB Musyarakah

[27] The second defendant's complaint is that BIMB Musyarakah, having invested a substantive sum of money in the company, should have kept a more 'watchful' eye on its investment and upon a winding up petition having been presented, should have attempted to have the debt resolved as it only amounted, in his recollection, to RM40,000. BIMB Musyarakah had a representative on the board of the company and ought to have resolved the debt given their large shareholding. However the second defendant complains that nothing was done resulting in the company being wound up. In the course of cross-examination the second defendant however conceded that it was not the duty of BIMB Musyarakah to 'save' the company. He also agreed that attempts had been made by BIMB Musyarakah to assist the company to sell the shares to a third party. However these attempts proved unsuccessful. Taken as a whole, this evidence was far from satisfactory to demonstrate any element of mala fides on the part of BIMB Musyarakah. Again this contention fails.

[28] Having considered the totality of the evidence it appears to this court that there is no reason why BIMB Musyarakah should not enforce the put option agreement dated 17 October 2001 which was entered into by it with the shareholders of the company as an integral part of its investment in the company. As stated at the outset, the primary issue raised by the second defendant was a contravention of s 223 of the Companies Act 1965. As reasoned above, the section is inapplicable in the circumstances of this case, as the shares sought to be disposed of, are not shares belonging to the company in liquidation. They are shares in the company belonging to BIMB Musyarakah. Accordingly the plaintiff is granted judgment in terms of prayer (i) of the statement of claim against the second, third and fifth defendants. The costs of the action are to be borne by the second defendant.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum